

General Information Letter: Nexus guidance is provided by 86 Ill. Admin. Code Section 100.9720.

August 14, 2001

Dear:

This will serve as a reply to your correspondence to Ms. Marie Keeney dated July 31, 2001. According to Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLRs") and General Information Letters ("GILs"). The regulations explaining these two types of rulings issued by the Department can be found at 2 Ill. Adm. Code sec. 1200 or on the Department's website at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics but are not, however, binding on the Department. In your letter, you have stated in relevant part as follows:

This firm represents a manufacturing concern ("Company") located in the Commonwealth of Kentucky. The Company is an S-corporation with shareholders all resident and domiciled in Kentucky. The basic business of the Company is as follows:

1. Purchase a "core" exterior residential metal door slab. The slab is solid metal with an insulated interior. The supplier applies the undercoat paint.
2. Cut holes in the doors (via jigs, dies and saws) in which to insert glass and locking hardware.
3. Paint or stain the door.
4. Insert colored glass into door.
5. Hang pre-finished door in company-assembled jamb.

The doors are primarily sold directly to retailers, who, in turn, install the doors in customer residences. Occasionally, the customer is a wholesaler who will sell the door to contractors.

The company currently utilizes common carriers to deliver the product to its customers. Effective September 1, 2001 the Company intends to deliver the finished product to Company customers by vehicles owned by the Company and by drivers employed by the Company.

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### **Requirement to File Corporate Income Tax Returns**

Please forward the second copy of this ruling (request) to your corporate income tax division. We request that a representative of that division advise whether it is their position that the Company is required to file a corporate income tax return with the State. It is important for those representative(s) to understand that the only association the Company will

have with the State is delivery of finished goods to customers in the State via Company vehicles. Further, the Company will not own or lease any real or personal property located in the State.

If the representatives determine that the Company is subject to filing a corporate income tax return in the State, please advise of the following:

1. The statutory authorities upon which such conclusion is based.
2. Whether the State respects the S-corporation election of the Company.
3. Whether the State will accept a "composite" return of an S-corporation with five (5) or fewer shareholders.

### **Prompt Request Requested**

As a representative of the State, the State is being allowed in excess of one (1) month to respond to our request for guidance. If a representative of the State fails to respond in a timely manner, it will be the position of this Firm that the failure to properly comply with the sales tax and income tax provisions of the State is the responsibility of the State.

Regarding the last paragraph of your correspondence, please be initially advised that the Illinois Department of Revenue cannot and will not be bound by the setting of artificial time limits nor estopped thereby from enforcing the income tax laws of the State of Illinois.

You appear to be asking for a nexus ruling. The question of nexus is highly fact-dependent. The Department does not issue PLRs regarding whether a taxpayer has nexus with this State. Such a determination can only be made in the context of an audit where a Department auditor has access to all relevant facts and circumstances. As a result, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

Section 201 of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/101 et seq., imposes a tax measured by net income on corporations for the privilege of earning or receiving income in this State. The Due Process and Commerce Clauses of the Federal Constitution limit the power of States to subject foreign corporations to tax. However, and unless protected by a federal statute known as P.L. 86-272, a foreign corporation has the requisite nexus to subject it to Illinois income tax where any part of its income is allocable to Illinois in accordance with the provisions of Article 3 of the IITA. That statute provides immunity from state income taxation for out-of-state corporations whose only activity within the state is limited to solicitation of orders for the sales of tangible personal property, where the orders are accepted or rejected outside the state, and, where accepted, such orders are filled by shipment or delivery from a point outside the state. Illinois construes the protection of P.L. 86-272 very narrowly. Almost any activity exceeding the parameters of that statute will cause that protection to be forfeited.

An out-of-state corporation can lose the immunity provided by P.L. 86-272 where its activities within the state exceed the mere solicitation standard of that law. A corporation's activities in Illinois beyond

solicitation that are more than *de minimus*, will establish nexus with Illinois thereby requiring its business income attributable to its Illinois activities to be apportioned to this State under IITA Section 304 (copy enclosed). Any income that is apportioned to Illinois will be subject to taxation under Section 201.

If an out-of-state corporation's activities are limited to those protected under P.L. 86-272, then such corporation will not be subject to taxation in Illinois when shipments or deliveries are made into Illinois by a third-party-owned means of shipment or delivery. The same holds true for shipments and deliveries in one's own vehicles. 86 Ill. Adm. Code Sec. 100.9720 (c) (5) (H).

With respect to your question regarding our filing requirements, IITA Section 502(a) describes when an Illinois income tax return is required. Pursuant to that section, an Illinois income tax return is required in two situations. The first situation is when a taxpayer is liable for Illinois income tax. The second situation is, in the case of a corporation qualified to business in Illinois, when the taxpayer is required to file a federal income tax return, regardless of whether such person is liable for Illinois income tax.

Under IITA Sec. 1501(a)(28), any corporation that has elected Subchapter S status for federal income tax purposes is automatically treated as a Subchapter S corporation for Illinois income tax purposes. No separate election is required.

For guidance on filing composite returns, see 86 Ill. Adm. Code Sec's. 100.5100 – 100.5170. The number of shareholders is not relevant.

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department.

Sincerely yours,

Jackson E. Donley  
Senior Counsel-Income Tax